IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

ALLEN PHILIP HAMILTON, Jr., *Appellant*, vs. SECRETARY OF DEFENSE, et al., *Appellees.*	No. 18898

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

APPELLANT'S OPENING BRIEF

J. B. Tietz,
410 Douglas Building,
South Spring and Third Streets,
Los Angeles 12, California,
Attorney for Appellant.

E. L. Mendenhall, Inc., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Cases

CASES

REGULATIONS

EXECUTIVE ORDERS

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

ALLEN PHILIP HAMILTON, Jr., *Appellant*, vs. SECRETARY OF DEFENSE, et al., *Appellees.*	No. 18898

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

APPELLANT'S OPENING BRIEF

JURISDICTION

This appeal is from a judgment of the District Court of the United States in and for the Southern District of California, Central Division, denying a writ of habeas corpus.

The District Court had jurisdiction by virtue of Title 28, U.S.C. §§ 451 and 2241 to receive the petition filed by the petitioner, seeking his release from the respondents.

This Court has jurisdiction to review, on appeal, the final orders of the District Court by virtue of Title 28, U.S.C. §§ 1291 and 1294(1).

STATEMENT OF CASE

Appellant filed a petition for a writ of habeas corpus [R.]. An order to show cause was issued [R.]. At the time of hearing, it was stipulated that the petition was to be considered as a traverse of the return and that the matter was to be heard as if a writ had been issued and that Exhibit "A" (petitioner's Selective Service file) attached to respondents' Return was the evidence to be considered and it together with the pleadings were to be basis for argument and decision [R.].

The petition alleged in substance that the Selective Service System order to report for and submit to induction was illegal because:

1. Said order is an illegal and arbitrary enforcement of the Universal Military Training Act of 1951, as amended, in that his local board has never given petitioner an Appearance Before Local Board, as provided by the Selective Service Regulations, and as requested in writing by petitioner.

2. Said order is illegal and void in that the local board arbitrarily refused to reopen the classification of petitioner, or, if the conduct of the board is to be considered as a matter of law a reopening then.

3. Said order is illegal and void in that said conduct at that juncture deprived him as a matter of fact of an

Appearance Before Local Board and of an administrative appeal that was based on a record that included the proceedings of an Appearance Before Local Board.

4. Said order is an illegal and arbitrary enforcement of the Universal Military Training Act of 1951, as amended, in that it is based on a classification of petitioner that is unsupported by any evidence.

5. Said order is illegal and void in that it is contrary to all the evidence before said Selective Service System.

Petitioner is therefore deprived of his liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States [R.].

The trial court, after argument, entered an order dismissing the petition and discharging the show cause order.

Notices of Appeal have been filed within the 60 days given by statute (Rule 73(a), F.R.C.P.) and this Court has expressed interest in expediting the appeal (Order of this Court, dated September 16, 1963). Moreover, counsel have agreed to file briefs in less than the time the rule affords and join in asking that the oral argument be set as soon after appellees' brief is filed as the court's convenience permits.

THE FACTS

All the facts are in petitioner's draft file, Exhibit "A" to respondents' Return.

The portions deemed pertinent to the issues of this appeal are:

Petitioner registered with Local Board No. 30, Richmond, California, in 1955.

On September 10, 1956, he filed with said Board his Classification Questionnaire (SSS Form No. 100) and, among other factual matter showed he was a full-time college student.

On October 28, 1958, his local board sent him a (California) form known as C-137, it being a request for up-to-date information showing status, classification-wise. He showed on it he was a college student.

On November 18, 1958, his local board classified him in Class I-A-C-1, as a registrant available for military service, first category of call.

On June 11, 1959, his local board again sent him a form C-137 and he again showed on it that he was a college student.

On August 3, 1960 his local board sent him an SS Form No. 127 (3-16-60), a National Current Information Questionnaire. He showed on it he was a college student.

On September 1, 1960, he was ordered to report for a physical examination.

On November 17, 1960, he was notified he was temporarily rejected.

On October 18, 1961, he informed the local board he had become the "entire support of my mother—not able to support herself as she has Parkinson's Disease" and that he had obtained employment. He added "Father passed away January 21, 1961."

He was given another physical examination and was again, on November 6, 1961 notified he was temporarily rejected.

On March 20, 1962, he was sent an SSS Form No. 118 (Rev. 5-26-60), termed Dependency Questionnaire. On it he showed he contributed $75.00 a month for his mother's support; that his total income from all sources the last 12 months had been $3,600.00 and that his earnings currently were "125.00 per week, before taxes;" that his wife was employed.

Under statement of Dependent he wrote and his mother signed

> "Mrs. Barbara Hamilton—mother I contribute her entire month income with the exception of a small amount that my father left her—he died January, 1961—my mother has a nervous disease called Parkinson's Disease—she is physically unable to work and it necessitates me supporting her—$75.00 per month—she owns her house—we keep in very close contact as I am an only child.
>
> s/ Barbara L. Hamilton
> March 25, 1962"

On April 26, 1962, he was again informed he had been temporarily rejected (after another examination) but was ordered to return for examination in October, 1962. Eventually, in January, 1963 he was found acceptable and so notified.

On January 11, 1963 his family attorney wrote the local board, as follows:

PAUL K. ROBERTSON
Attorney and Counselor at Law
777 North First Street
San Jose California

Telephone 297-6311

The Selective Service Bureau
Local Draft Board
1206 Main Street

Los Angeles, California

Gentlemen:

Re: Allen P. Hamilton, Selective Service No. 4-30-37-332.

For whatever effect it may properly have upon your decision to induct Mr. Allen Hamilton into the armed services, I wish to advise you of the following information: Mr. Hamilton has been appointed a conservator or guardian of his mother's estate. For some time his mother has been quite ill with Parkinson's Disease and has been unable to adequately care for her estate. Two years ago Mrs. Hamilton's husband passed away and apparently that tragedy coupled with Parkinson's Disease has had some effect upon her mental and emotional stability. At present Mrs. Hamilton has remarried to a man who, from all appearances, has no intention of supporting her or caring for her in this time of need. Should Mr. Hamilton be inducted the family would be presented with quite serious problems. Mrs. Hamilton's newly acquired husband would be the obvious choice as her guardian and conservator. Needless to say, neither Mr. Hamilton nor I place much faith in this gentleman's ability to preserve the estate.

As a matter of fact, with Mr. Hamilton unable to perform his duties as conservator, I think it highly probable that in a short time Mrs. Hamilton might be on the welfare rolls. I hope that this letter will aid you in your consideration of Mr. Hamilton's case.

Very truly yours,

s/ Paul K. Robertson
PAUL K. ROBERTSON

PKR:db
cc: Local Draft Board, Mr. Hamilton

On January 27, 1963 petitioner was sent another SSS Form No. 118 and he showed on it that his contribution to his mother's support was varied and that she had an estate. His detailed statement was:

"Concerning Barbara Harris—My mother has remarried to an Albert Harris since the death of my father two years ago—I have become the conservator of her estate—my mother has a long case history of a disease called Parkinson's. This sickness attacks the nervous system and effects the mind as well as the motor action—of the body.

"Albert Harris is unable to support my mother he has no job, and being an only son—if her estate were left in the wrong hands, I am afraid that my mother would be in serious trouble—at this time, I am now just beginning to bring in some income from her estate."

On February 25, 1963 he was ordered to report for induction but this was postponed. On February 27, 1963 he wrote for an opportunity to meet with the local board. This request was rejected on the 28th.

On the 28th he asked for appellate rights and gave reasons for his tardiness namely, that he was a traveling salesman and was away when the notice came informing him of his rights for an Appearance and/or an Appeal.

This Notice, which is SSS Form No. 110 reads:

"NOTICE OF RIGHT TO PERSONAL APPEARANCE AND APPEAL

"If this classification is by a local board, you may, within 10 days after the mailing of this notice, file a written request for a personal appearance before the local board (unless this classification has been determined upon such personal appearance). Following such personal appearance you may file a written notice of appeal from the local board's classification within the applicable period mentioned in the next paragraph after the date of the mailing of the new notice of classification."

He followed this up with a letter, received by the board on March 4th:

Director
Local Board No. 30
1329 Nevin Avenue
Richmond, California

Gentlemen:

My wife read your letter to me over the telephone and I hasten to answer it from downtown.

I thank you for giving me to the 6th to get in the information.

My employer has consulted his attorney and thinks that, to make certain *all* pertinent facts are presented, we should have a photocopy of the file. By studying the file we can determine better what has been left out that I can readily furnish.

There are many pertinent facts that I believe are not in the file, at least not properly corroborated and therefore your final decision should have the benefit of the corroboration that is available corroboration that may make all the difference between my present classification and a dependency classification. For example, although I am certain I have stated on the Dependency Questionnaire that I am the Conservator of my mother I am certain that I never filed with you court papers (certified, the lawyer tells me I should furnish) of this conservatorship proceeding nor did I give you doctor's letters that show she needed a Conservator.

I therefore will send you a cashier's check for the amount you state and ask you send me a photocopy of my file.

Sincerely yours,

s/ Allen P. Hamilton

450 1/2 Hilgard Ave.
Los Angeles 24, Calif.

On March 6th, the local board conceded the merits of his excuse for tardiness and wrote:

March 6, 1963

4-30-37-332

Allen Philip Hamilton, Jr.
950 1/4 Hilgard Avenue
Los Angeles 24, California

Dear Sir:

Due to your traveling and not receiving your new classification of I-A until after your 10 day right of appeal had expired the members of Local Board No. 30 have this date Postponed your Order to Report for Induction on March 14, 1963, to enable you to exercise your right of appeal, postponement is enclosed herewith.

The Board has also requested that, within the next 10 days, you submit the following information to them for consideration.

1. Official copy wherein you have been appointed as conservator or guardian of your mothers' estate.

2. The approximate value of your mothers estate, whether in property, cash, bonds, etc.

3. Statement from your mothers' physician as to her present physical condition.

We have been advised by our District office that you may have your file photostated if you so desire, as long as you wish to pay for same. This service is offered by our State Headquarters in Sacramento at an approximate cost of 30¢ per sheet of which there are approximately 94 pages, in your Selective Service File. Please advise in this respect.

By Order of Local Board No. 30
s/ Winnie C. Ware

wcw
encl.

Petitioner then filed with the local board the following:

1. The official inventory of his mother's estate showing it totalled $17,444.77, $15,500.00 being real estate and furnishings;

2. His Letters of Conservatorship.

3. The doctor's summary of his mother's case, as follows:

Winston W. Benner, M.D.
2930 McClure Street
Oakland 9, California

April 18, 1963

MEDICAL REPORT

Re: Mrs. Barbara Hamilton

TO WHOM IT MAY CONCERN:

Mrs. Barbara Hamilton has been under the care of this office since March of 1951. At that time she was 31 years of age. She then had a moderately severe post-encephalitic Parkinsonism with frequent oculogyric crises. Superimposed on this was a marked emotional problem with considerable depression. She had, at that time, been under the care of a psychiatrist for approximately four years. Examination was not remarkable except for moderate obesity and the coarse tremor incident to the Parkinsonism. She wept constantly during examination. During 1951 her symptoms were slightly improved by treatment of the Parkinsonism medically. She also had psoriasis, which responded poorly. She did fairly well while being closely watched and for a period of time, had less trouble with the Parkinsonian tremors and fewer oculogyric crises. However, during 1952, 1953 and 1954

depression and anxiety persisted. She continued to have several oculogyric crises per week. Various medications were tried to control her anxiety, depression, and Parkinsonism symptoms without too much success. During 1956, she improved somewhat on medication with Kemadrin, but continued to have many problems and many symptoms. She continued to gain weight. She had frequent respiratory infections. She remained quite depressed and during the last year during which I saw her, in 1960 and 1961, developed considerable mental difficulty. On one occasion, suicide was attempted. Her husband died suddenly and this caused severe emotional disturbance.

Following her last visit to my office in September, 1961, I continued to be aware of her problems and indirectly hear of mental difficulties. It is my understanding that she has further deteriorated since 1961. If there are any further questions concerning this case, I would be happy to furnish what information I can.

Sincerely,

/s/ W. W. Benner, M. D.
Winston W. Benner, M. D.

WWB:vh

On May 14, 1963, the local board again refused to formally reopen his case and refused him an Appearance Before Local Board and sent the file to the appeal board. [Ex. 135]

On May 20, 1963, the local board thereafter notified him that the appeal board had not changed his classification, that the Order to Report for Induction sent him on

May 20, 1963, was cancelled and that he should report for induction on July 8, 1963. [Ex. 144]

QUESTIONS PRESENTED AND HOW RAISED

All question presented were raised by the petition (pages 2-3, "Grounds"). [R.]

I

Was the Local Board required to give petitioner an Appearance Before Local Board?

II

Was the Local Board required to reopen petitioner's classification?

III

Was there a basis in fact for the I-A classification?

SPECIFICATION OF ERRORS

I

The district court erred in dismissing the petition.

SUMMARY OF ARGUMENT

I

A Selective Service System registrant has only one opportunity to meet his local board face to face and present his case. This opportunity was illegally denied appellant.

Appellant was thereby also deprived of the additional opportunity of an augmented file on his administrative appeal.

II

A registrant is entitled to a "reopening of classification" where, as here, new and further evidence is presented, evidence which, if true, requires reclassification.

Here also, appellant was deprived of an augmented record on administrative appeal.

III

There must be a basis in fact for a classification; a classification made without a basis in fact is illegal.

A *prima facie* case for a deferred classification shifts the burden of going ahead with proof to the board. Where, as here, the registrant presents a *prima facie* case the local board is required to "build a record", to use the expression found in the Supreme Court decision governing such a situation. Here, the local board did not build a record but proceeded to reject its registrant's claim on the basis of suspicion or speculation. These bases have been judicially held insufficient to support a classification.

ARGUMENT

Appellant Was Illegally Denied an Opportunity to Meet His Local Board Face to Face, Was Illegally Denied a Reopening of His Classification and His Classification Is Without Basis-in-Fact

It is noted from our above statement that we are of the opinion a combined, interwoven question is involved

here. We believe that an attempt to formally separate the parts is unnecessary and productive of unnecessary repetition.

Our argument must be largely interwoven with some inherent repetition for the logic of our contention goes like this:

1. The deprivation of the Appearance Before Local Board was illegal because the classification was reopened by the conduct of the board, as the pertinent regulations have been interpreted by the courts. A reopened classification permits the registrant to start anew, that is, with respect to his hearing and appellate privileges.

2. If the court is not to be convinced the conduct of the board was itself a reopening (as a matter of law) then we contend that the conduct of the board (chiefly, its demand for specific evidence and in a verified form) plus the conduct of the appellant (chiefly his full compliance with this demand of the board) *required* a reopening, as the pertinent regulation itself requires.

3. Illegal deprivation of a reopening is in itself a denial of due process.

4. The right to a reopening depends upon the production of new or further evidence that makes out at least a *prima facie* case. Therefore, the no basis in fact point becomes an issue. In short, one point depends largely on one or more of the others.

The three points above captioned will be dealt with in the order given, but our argument on them, and their several included points, will be made as appears desirable.

First, it is appellant's contention that both fairness and the law give him the privilege of at least once meeting with his local board to discuss with them his reasons for a deferred classification and their reasons for their contrary decision, namely, classifying him in Class I-A.

The fairness of this proposition need not be argued in the abstract since the administrative agency's regulations themselves provide for such a hearing.

1. Regulations on hearings [32 C.F.R.]:

> 1624.1 Opportunity To Appear In Person. —(a) Every registrant, after his classification is determined by the local board except (1) a classification which is determined upon an appearance before the local board under the provisions of this part or (2) a classification in Class I-C, Class I-W, Class IV-F, or Class V-A, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended.
>
> (b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: Provided, That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: And provided further, That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

1624.2 Appearance Before Local Board. —(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. A notation that he has appeared shall be entered on the Classification Questionnaire (SSS Form No. 100).

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and, if the local board determines that such new information justifies a change in the registrant's classification, the local board shall reopen and classify the registrant anew. If the local board determines that such new information does not justify a change in the registrant's classification, it shall not reopen the registrant's classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, or determines not to reopen the registrant's classification, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

(e) Each such classification or determination not to reopen the classification made under this section shall be followed by the same right of appeal as in the case of an original classification.

Our contention that the appellant was illegally deprived of this Appearance Before Local Board needs argument because, at first reading of the regulation, it may be believed that if a registrant does not make his written request "[w]ithin 10 days after the local board has mailed a notice of classification (SSS Form No. 110) to him" he has forever waived this particular right. We will show that there are frequent situations where this right is renewed and argue that the facts of this case bring appellant within this class of situations.

2. Regulations on Reopening:

PART 1625—REOPENING AND CONSIDERING ANEW REGISTRANT'S CLASSIFICATION

REOPENING REGISTRANT'S CLASSIFICATION

1625.1 Classification Not Permanent.—(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupation, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which ,if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the

> local board has mailed to such registrant an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

It is evident that a significant portion of regulation § 1625.2 is the phrase "[w]hich, if true, would justify a change in the registrant's classification;".

We consider this regulation the crux of our case but first we will deal negatively with a point of law involved. It may be argued by appellees that this regulation is couched in permissive language, that it reads "The local board may reopen and consider anew the classification of a registrant. . . ."

The courts, however, have held it is a denial of due process for a local board to fail or refuse to reopen a classification when evidence is presented "[w]hich, if true, would justify a change in the registrant's classification;". In short, that in this regulation, may means shall, under some circumstances, or put another way that it is an abuse of discretion to refuse to reopen when such evidence is presented.

Stain v. *United States,* 9 Cir., 1956, 235 F.2d 339, 343.

Brown v. *United States,* 9 Cir., 1954, 216 F.2d 258, 260.

Talcott v. *Reed,* 9 Cir., 1954, 217 F.2d 360, 363.

Before discussing the above and applicable cases from other jurisdictions we will argue that appellant complied with the reopening requirements of the law in all ma-

terial ways and qualified for an Appearance Before Local Board.

Naturally, where a registrant makes a written request that arrives at the board's office within 10 days after the board mails him a notice of a classification that he finds objectionable there should be no controversy. Such a rare controversy has never reached the point of reported opinion.

Controversy has arisen where, as here the registrant had no basis for complaining of his classification at the time it was mailed him, but had a change of status later. In such situations, as here, where the board fails to accord the registrant the full discussion and appellate opportunities provided by the regulations the question chiefly turns on whether the registrant's additional evidence was "new and further evidence" which, if true, required a reclassification. If it was then it could be fairly claimed that the board was remiss in not formally "reopening" the classification. A reopening revives the rights of Appearance Before Local Board and of an administrative appeal.

Decisions of this Court (and of trial courts in this jurisdiction) as well as those of the other jurisdictions support this view.

First, let us consider an included matter: the importance of new evidence concerning status. In *Knox* v. *United States,* 9 Cir., 1952, 200 F.2d 398, the registrant had an Appearance Before Local Board but he was not reclassified after this hearing, as the regulation required. The Court observed:

> "So far as we are aware it is the uniform view of the courts passing on the subject that failure to accord a registrant the procedural rights provided by the Regulations invalidates the action of the draft board." [401]

Then the court concluded:

> "The significant disregard of the registrant's procedural rights in this instance lies in the fact that upon his personal appearance after classification he presented for the first time evidentiary matter in support of his formal claim to the conscientious objector status embodied in his questionnaire, and no action appears to have been taken to classify him in light either of this evidence or of the showing contained in Form 150, later submitted." [401-402]. . . .

Six months after *Knox, supra,* Judge Lemmon, then a trial judge, pointed out in *United States* v. *Frank,* N.D. Calif. 1953, 114 F. Supp. 949:

> "The letter killeth, but the spirit giveth life."[1]
>
> "[3] The tendency of the courts is toward a liberal construction of the 1948 and 1951 Selective Service Acts, in favor of selectees. In ex parte Fabiani, D. C. Pa. 1952, 105 F. Supp. 139, 146-147, the Court said:
>
> "The different objective to be achieved by the new Act behooves us to employ a more liberal standard of judicial review, so as better to protect the rights of the individual. Should—which God forbid —world tensions increase greatly or should general war come, then the judicial arm can once again cut

1. II Corinthians 3:6.

to the barest minimum its supervision of the operations of the draft." [951-952]

Judge Lemmon then found the defendant Not Guilty on the strength of *Knox, supra.*

The importance of the Appearance Before Local Board in the scheme of Selective Service processing has probably never been more vividly illustrated than by Allen Hamilton's experience. He gave the local board *exactly* what it requested of him, and it was not enough! Why? If he had had an Appearance Before Local Board he could have said to them:

Gentlemen, I filled out your forms and showed I had a dependency situation. When I persisted in writing to you for the dependency classification you finally wrote me on March 6, 1963:

Dear Sir:

Due to your traveling and not receiving your new classification of I-A until after your 10 day right of appeal had expired the members of Local Board No. 30 have this date Postponed your Order to Report for Induction on March 14, 1963, to enable you to exercise your right of appeal, postponement is enclosed herewith.

The Board has also requested that, within the next 10 days, you submit the following information to them for consideration.

1. Official copy wherein you have been appointed as conservator or guardian of your mother's estate.
2. The approximate value of your mothers estate, whether in property, cash, bonds, etc.

3. Statement from your mother's physician as to her present physical condition.

We have been advised by our District office that you may have your file photostated if you so desire, as long as you wish to pay for same. This service is offered by our State Headquarters in Sacramento at an approximate cost of 30¢ per sheet of which there are approximately 94 pages, in your Selective Service File. Please advise in this respect.

By Order of Local Board No. 30
/s/ Winnie C. Ware

wcw
encl. [Ex. 100]

I complied. I sent you exactly what you asked for. [Ex. 116-121, 127-129] Now, gentlemen, what is the trouble?

Do you want more evidence from me? If so name it. Have the standards changed since you wrote me asking for the documents I sent you? Is something else required now? I think I'm entitled to know.

Or does the country need me so badly that I must be called regardless of the present state of the regulations or of my family needs? If that is so tell me and I'll withdraw my claim for deferment.

It should be undisputable that the importance of the hearing to the registrant is great. Many courts have emphasized this—

"It is important that a registrant be given an opportunity to appear in person before a Local Board. A pleader can almost always make a more effective presentation in the give and take of an argument in person than he can in writing. Many fine young

men cannot express themselves well in writing, but they can do much better when they speak and are not so much concerned with their method of expression." [121]

U. S. v. *Derstine,* E.D. Pa., 1954, 129 F. Supp. 117.

Also see *United States* v. *Fry,* 203 F.2d 638; *United States* v. *Stiles,* 169 F.2d 455, 3 Cir., 1948; *United States ex rel. Berman* v. *Craig,* 3 Cir., 1953, 207 F.2d 888; *United States* v. *Peterson,* 53 F. Supp. 760 (N.D. Calif. S.D.); *United States* v. *Laier,* 52 F. Supp. 392 (N.D. Calif. S.D.); *Davis* v. *United States,* 199 F.2d 689 (6th Cir.); Compare *Knox* v. *United States,* 200 F.2d 398 (9th Cir.)

The value of an Appearance Before Local Board is really beyond need of argument.

3. The conduct of the board was a reopening of the classification.

We argue first that a "reopening" of a classification need not be formal and explicit. The leading case on this subject is *Packer* v. *United States,* 2 Cir., 200 F.2d 540. The pertinent facts are that Packer did not indicate on his Classification Questionnaire (he did not sign Series XIV, a request for the Special Form for Conscientious Objector) that he was a conscientious objector to war. He was thereafter classified in Class I-A. He neither appealed nor requested an Appearance Before Local Board within the 10 day period. Subsequently he was physically examined and found acceptable for military service. When he was notified of this he requested the Special Form for Conscientious Objector. The local board sent it to him. He executed it fully and sent it back to the board. Two days

after this Special Form was received by the board it ordered that there would be no reopening of his classifications. He then wrote asking for an Appearance Before Local Board.

The local board denied the request and ordered him to report for induction. The New York City Director of Selective Service notified the board its conduct was the same as a reopening. The local board then sent the file to the appeal board, without formally reopening.

The Second Circuit held:

> "Since the Local Board cancelled the defendant's order of induction and he was allowed to take an appeal to the Appeal Board, which classified him in I-A, it is our opinion that the Local Board permitted the reopening of his case and that any previous waiver may not now be claimed by the government. See 32 C.F.R. 1625.2." [541]

This case also involved the problem of the right to see the FBI reports and the Supreme Court reversed on the FBI point. It is therefore established, in the Second Circuit at least, that such conduct of the local board, as found in Packer and in Hamilton is a reopening.

Also see *Vincelli* v. *United States,* 1954, 216 F.2d 681 (rehearing) and 215 F.2d 210, 1954.

4. The evidence produced by its registrant required a reopening by the board.

Should the court not decide to follow the reasoning and holding of the Second Circuit, in *Packer, supra,* we rely on this point.

We first argue that the registrant is entitled to a strict and faithful following of the procedural regulations.

The Third Circuit, in *Stepler* v. *United States,* 1958, 258 F.2d 310, summed the matter up this way:

> "Furthermore we are here not concerned with whether the defendant made out a case which meets the statutory criteria. We are concerned only with the question whether the local board complied with the law and the regulations and we conclude that it did not comply with the regulations but denied the defendant a procedural right which vitiated the entire proceeding."

The steps to be taken as a condition precedent to induction must be strictly followed. Otherwise the order to report is void. See *Ver Mehren* v. *Sirmyer,* 36 F.2d 876, 881, 8th Cir.

"There must be a full and fair compliance with the provisions of the Act and the applicable regulation." (*United States* v. *Zieber,* 161 F.2d 90 (3rd Cir.). See also *Ex parte Fabiani,* 105 F. Supp. 139.)

Simmons v. *United States,* 1955, 75 S. Ct. 397:

> "Petitioner has been deprived of the fair hearing required by the Act, a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation." (402)

Olvera v. *United States,* 5th Cir., 1955, 223 F.2d 880:

> "As long, therefore, as the law stands as it is now written and construed, it is and will continue to be of

> the first importance that the predicate for such conviction without trial by jury be at the least laid with the utmost fidelity not only to every substantial safeguard and right which the law has accorded the objector but also to the procedural requirements compliance with which is essential to the validity of board orders." [884]

We next deal with the proposition that a late request for consideration of new evidence, for reopening of classification is reasonable and within the law, its inconvenience administratively being immaterial.

The Selective Service Regulations are not to be construed strictly against the registrant. *Berman* v. *Craig,* (3rd Cir. 1953) 207 F.2d 888, 891; *United States* v. *Greene,* (7th Cir. 1955) 220 F.2d 792; *Cox* v. *Wedemeyer,* (9 Cir. 1951) 192 F.2d 920, 922-923.

The regulations contemplate a late request for a reopening of the case, because Section 1625.14 provides that even an order to report for induction shall be cancelled when the request to reopen is granted. The spirit of this regulation was carried out in the case styled *In re Abramson*, 196 F.2d 261 (3rd Cir.). In that case the wife of the registrant became pregnant after registrant had exhausted his remedies and shortly before the order to report for induction was mailed. The court held that the registrant stated a good case for relief in that the "[l]ocal board without lawful excuse refused to consider or act upon a timely request for reclassification and deferment asserted by the registrant upon a ground and with a tender of proof declared sufficient by the controlling regulations. This

court has pointed out that situations of this type are within the very limited reach of habeas corpus issuable after induction to challenge the legality of the classification which enabled induction. *Ex parte Stanziale,* 3 Cir., 1943, 138 F.2d 312. Cf. *Estep* v. *United States,* 1945, 327 U.S. 114, 66 S. Ct. 423, 90 L. Ed. 567; *Cox* v. *United States,* 1947, 332 U.S. 442, 68 S. Ct. 115, 92 L. Ed. 59." [264]

The reason for the regulation authorizing the reopening by the local board is obvious. Suppose a registrant may be liable for training and service at the time of registration, at the time of filing the questionnaire and at the time of the final classification. But at the time of the order to report for induction he had been inducted into some governmental office to which he had been elected, entitling him to deferment. In such a situation it would be plain that the registrant would be entitled to a reopening of his classification. A failure or refusal to reopen in such a situation would be obviously unreasonable, arbitrary and capricious.

This argument is supported by the holding in *Hull* v. *Stalter,* 1945, 151 F.2d 633 (7th Cir.).

In such a situation the board must have some real, substantial reason or evidence why it does not exercise its discretion and reopen the case. Here the same situation existed.

It is respectfully submitted that the local board arbitrarily and capriciously refused to reopen the classification. It abused its discretion in refusing to reopen. It defied the regulation.

We next deal with the formal sufficiency of Allen Hamilton's request for reopening.

In *Townsend* v. *Zimmerman,* 237 F.2d 376 (1956), the Sixth Circuit held:

> "The communication of the information by Townsend to the draft board chairman of this change of status was tantamount to a request that his classification be reopened. Under the circumstances of this case it was not necessary that a more formal request be made. Cf. Ex parte Fabiani, D.C. E.D. Pa. 1952, 105 F. Supp. 139, 148." (378)

The Second Circuit in *Berman* v. *Craig,* 207 F.2d 888, said:

> "Sections 1625.1 and 1625.2 of the Regulations taken together require a local board to consider a new classification of a registrant who reports, within 10 days after it occurs, a change in his status which may require his reclassification. This it is the board's duty to do even though, as here, an order to report for induction has been sent to the registrant, provided he has not yet been inducted. Such a timely report was made to the local board in this case by Berman through his telegram of July 3, 1952, supplemented and corroborated by the letter of July 8th from the theological school. It is true that the telegram used the word 'appeal'. But this did not justify the board in regarding it as solely an appeal in the technical sense or in wholly ignoring the changed draft status which is disclosed. Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel. The local board should have given consideration to Berman's change of status and determined whether it required his reclassification. Its

failure to do so deprived him of an important procedural right to which he was entitled." (891)

Cf. *Olvera* v. *United States,* 223 F.2d 880 at 833 (5th Cir., 1955); *United States* v. *Henderson,* 223 F.2d 421 (7 Cir., 1955); *United States* v. *Ransom,* 223 F.2d 15 (7 Cir., 1955).

In *Hull* v. *Stalter,* 151 F.2d 633, 7 Cir., 1945, this Court said:

> "We see no reason why a registrant was a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. In fact, the latter situation seems to be contemplated by § 5(h) of the Act, which provides that 'no . . . exemption or deferment . . . shall continue after the cause therefor ceases to exist.' The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to a deferment." (635)

It may be argued by the government that the "may" in the regulation shows reopening is not mandatory. We could argue that in this context "may" means "shall" but

rely more on our point: reopening may be discretionary but here the facts show abuse of discretion.

In *United States* v. *Stepler*, 3rd Cir., 1958, 258 F.2d 310, the appellant, classified as a I-O conscientious objector claimed a minister's IV-D classification. He was informed by the state director that "[h]is file had been carefully reviewed and as no procedural errors or denial of rights were apparent, no injustice seemed evident. It was also stated that defendant's case had received the consideration of the local board, the appeal board and the appeal agent and all had concurred that a ministerial deferment was unwarranted but that the local board would be requested to consider the additions which had been made to the file since the action of the appeal board to determine whether or not a reopening of defendant's case was warranted. On July 24, 1953 defendant was advised by the local board that the evidence did not warrant reopening his classification." [312]

Stepler's local board thereafter gave him a formal Appearance Before Local Board, the local board again classified him in Class I-O and placed its reasons in the file. He again took an appeal from this adverse decision. The appeal board once more classified Stepler as a conscientious objector.

The state director then wrote the local board—

> "It has been commented that an examination of the cover sheet discloses that the local board has denied the registrant's ministerial claim on a basis which is not in accord with the law and the regulations. Therefore, the file should be further considered by the local board.

> "It is requested that this case be considered by your board at its next meeting, if possible. Please advise this headquarters of your determination." [314]

The local board replied:

> "The Board refuses to reopen this registrant's classification on the basis that he does not qualify for a 4-D under Section 1622.43 of Selective Service Regulations." [314]

The Third Circuit pointed out that "Even under § 1625.2 which provides that under circumstances outlined in that section a local board 'may' reopen and consider anew a registrant's classification it has been held that its failure to do so, under particular circumstances, amounted to a denial of procedural due process of law.[3]"

As indicated by *Stepler, supra, the Second Circuit,* in *United States* v. *Vincelli,* 215 F.2d 210, has construed § 32 C.F.R. § 1625.2—

> "[1, 2] Though the language in the regulation is permissive merely that does not mean that a local board may refuse to reopen arbitrarily, but requires it to exercise sound discretion. That, in turn, requires, when the basis of an application is not clearly frivolous, an inquiry designed to test the asserted facts sufficiently to give the board a rational base on which to put decision. This board, at least, began such a procedure when it sent the appellant the conscientious

---

"3. *United States* v. *Vincelli,* 2 Cir., 1954, 215 F.2d 210; *United States* v. *Ransom,* 7 Cir., 1955, 223 F.2d 15; *United States* v. *Henderson,* 7 Cir., 1955, 223 F.2d 421; *Olvera* v. *United States,* 5 Cir., 1955, 223 F.2d 880." [315]

objector questionnaire. That was itself a reopening, see United States v. Packer, 2 Cir., 200 F.2d 540; reversed on other grounds in United States v. Nugent, 346 U.S. 1, 73 S. Ct. 991, 97 L. Ed. 1417, and the vote of the board, though in terms a denial of a reopening, was in effect the denial of a reclassification on the merits after a reopening for their consideration. Consequently Selective Service Regulation 1625.11, 32 C.F.R. Section 1625.11, was applicable and the board was required to classify him again 'in the same manner as if he had never before been classified.' This included 'the same right of appearance before the local board and the same right of appeal as in the case of an original classification.' Selective Service Regulation 1625.13, 32 C.F.R. Section 1625.13. These are substantial rights and the board's procedure in this instance by depriving the appellant of them, was a denial of due process which made his I-A classification a nullity. United States v. Fry, 2 Cir., 203 F.2d 638. For the reasons stated in the opinion in the case just cited, it is no answer to say that the letter of December 26, 1950, was treated as an appeal. See also United States v. Stiles, 3 Cir., 169 F.2d 455; U.S. ex rel. Berman v. Craig, 3 Cir., 207 F.2d 888." [212-213]

The Seventh Circuit's decision in *United States* v. *Ransom,* 1955, 223 F.2d 15, is in accord.

"The local board's original determination was probably correct, but the question before us is whether or not it could constitutionally refuse to reconsider defendant's classification *in the face of the defendant's subsequent allegations and the evidence tending to support them.*" (Italics supplied) [17]

* * *

"The local board should not be able to escape the requirement of a basis in fact by simply refusing to reopen a registrant's file and consider it further." [17]

* * *

"When such a prima facie case is presented and the board has no basis for refusing the requested classification, it must investigate further. If further investigation fails to disclose any basis for refusing the registrant's requested classification, it must be granted." [18]

5. The refusal to reopen was arbitrary, capricious and without basis in fact.

Section 1622.30 of the regulations during the period of appellant's processing provided:*

"1622.30 Class III-A: Registrant With a Child or Children; and Registrant Deferred by Reason of Extreme Hardship to Dependents.—(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist, or veterinarian.

(b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith: Provided, That a person shall be considered to be a dependent of a registrant under

*This regulation was amended by E. O. 11119 on September 13, 1963.

this paragraph only when such person is either a citizen of the United States or lives in the United States, its Territories, or possessions.

(c) (1) The term 'child' as used in this section shall include a legitimate or an illegitimate child from the date of its conception, a child legally adopted, a stepchild, a foster child, and a person who is supported in good faith by the registrant in a relationship similar to that of parent and child but shall not include any person 18 years of age or over unless he is physically or mentally handicapped.

(2) As used in this section, the term 'Physician' means a registrant who has received from a school, college, university, or similar institution of learning the degree of doctor of medicine or the degree of bachelor of medicine, the term 'dentist' means a registrant who has likewise received the degree of doctor of dental surgery or the degree of doctor of dental medicine, and the term 'veterinarian' means a registrant who has likewise received the degree of doctor of veterinary surgery or the degree of doctor of veterinary medicine.

(3) No registrant shall be placed in Class III-A under paragraph (a) of this section because he has a child which is not yet born unless prior to the time the local board mails him an order to report for induction which is not subsequently cancelled there is filed with the local board the certificate of a licensed physician stating that the child has been conceived, the probable date of its delivery, and the evidence upon which his positive diagnosis of pregnancy is based.

(d) In the consideration of a dependency claim, any payments of allowances which are payable by

the United States to the dependents of persons serving in the Armed Forces of the United States shall be taken into consideration, but the fact that such payments of allowances are payable shall not be deemed conclusively to remove the grounds for deferment when the dependency is based upon financial considerations and shall not be deemed to remove the grounds for deferment when the dependency is based upon other than financial considerations and cannot be eliminated by financial assistance to the dependents."

The attitude of the Selective Service System and of the court below, concerning whether there was a basis in fact for the classification was grounded upon error. To begin with, it ignores the doctrine of *Dickinson* v. *United States,* 346 U.S. 389 (1953). That decision requires that the board, "* * * must find and record affirmative evidence that he has misrepresented his case * * *"—346 U.S., pp. 396, 397, 399 (dissenting opinion). Also ignored are the teachings of a long line of Court of Appeals decisions that will be cataloged several pages hereinafter.

The Supreme Court, in Dickinson, refers to affirmative evidence of sham and to its recordation. Neither exists in Hamilton's file.

As quoted above, § 1622.30 provided that a registrant is to be classified in Class III-A when he presents evidence to show his induction would result in extreme hardship to "a . . . parent . . . dependent on him . . . when such person is a citizen or lives in the United States."

Appellant made such a showing of fact, adding the expert opinions of a doctor and a lawyer. This, combined, went beyond a *prima facie* case to show he came within

the provisions of the regulation. If what he presented was untrue his *prima facie*** case was destroyed. There is nothing in the record that tends to show what he presented was untrue or even suspect. The board made an effort to fulfil its obligation to test his claims and called on him for certified evidence of his alleged facts. He complied. No effort was thereafter made to impeach the credibility of his evidence. This is truly a case of an adverse, arbitrary decision based on suspicion and speculation.

It cannot be argued that board believed insufficient evidence was presented because (1) the board never said so and (2) the board had ample opportunity to say so if it so believed and (3) when the board spoke it was solely with respect to verification of the three main items of evidence he had already submitted.

Consequently, we do not have present a question of veracity or authenticity of evidence. Nor do we have a question of quantity, quality or degree because of the somewhat unusual facts: when the registrant asked his board what more was needed from him, it particularized and he complied.

It may occur to one or more members of this Court that if he had been sitting on that draft board he would have asked for X, Y or Z facts.

**The language of Dickinson is:

> "But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.
>
> "Reversed." (74 S. Ct. 152, 158)

The courts are not authorized to substitute their judgment for that of the boards. The Supreme Court has so declared. *Estep* v. *United States,* 1945, 327 U.S. 114.

And in *Witmer* v. *United States,* 348 U.S. 375 (1954), the court added at pages 380-381:

> "The courts may not sit as super draft boards, substituting their judgment on the weight of the evidence for the judgment of the designated selective service agencies."

The board decided that the only open question was the authenticity of the registrant's evidence. If it believed that his evidence was insufficient, in any category, there was no need to go into the verity of the remainder. Neither the court below nor this court is permitted to substitute its judgment for that of the local board.

Let us suppose that this court is unanimously agreed that if it had been the board it would have ended the matter before the moment when the board called on its registrant for verification; that it would have said to him:

> "We demur to your showing."

Perhaps such a demurrer by the board would prevail but we need not take time arguing it for the rule is clear: the courts may not substitute their judgment for that of the board's.

The judgment of the board is clear: the registrant had made out a case if he could verify his evidence. They spelled out exactly what they wanted. He gave it to them.

The Selective Service System raised no question (none is recorded) concerning the veracity of the appellant. The question therefore is not one of fact, but is one of law; *Dickinson* v. *United States, supra.* The law and the facts in his file, at least *prima facie,* established that appellant presented a dependency claim.

This case presents a legal situation like that faced by the Fifth Circuit in *Williams* v. *United States,* 216 F.2d 350, wherein the Court said:

> "The Supreme Court has simplified the duty of courts in cases of this kind. The tasks of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. Dickinson v. United States, 340 U.S. 389, 74 S. Ct. 152, 157. The District Court stated that it found such evidence, but failed to state what it was. After a diligent search, we have found none." (351)

In view of the fact that there is no contradictory relevant evidence in the file, disputing appellant's statements and there is no question of veracity presented, the problem to be determined here by this Court, appellant repeats, is one of law rather than one of fact. The board itself determined the fact problems. It accepted his evidence, if and when verified. The question, to be determined is: Was the decision to refuse to reopen and to keep him in Class I-A arbitrary and capricious?

The undisputed documentary evidence in the file showed that the appellant had a dependent mother, as

well as wife. This showing brought him squarely within the statute and the regulations providing for classification in Class III-A.

At one time many courts were of the opinion that the boards were free to disbelieve anything and everything presented by a registrant and without an explicit finding. Some likened the registrant to a witness on the stand. This view, whatever merit it possessed became obsolete with the advent of *Dickinson* because it flatly held that a *prima facie* case could not be ignored and, as interpreted by Mr. Justice Jackson and many courts since that the "boards must build a record." So what was required of Hamilton further than that furnished by him? That he show his wife and mother were both bedridden? The law did not require Hamilton to show anything more. The board could have demanded more detail. What it demanded he supplied, promptly and fully. It was up to the board to make a showing if it could, to weaken or destroy his showing. The Supreme Court, in *Dickinson,* cataloged the methods the board could use and the agencies of the government at its disposal to build a showing that its registrant was a liar or a sham or had not painted a true picture.

It has been held by many courts of appeal that the rule laid down in *Dickinson* v. *United States, supra* (holding that if there is no contradiction of the documentary evidence showing exemption as a minister, there is no basis in fact for the classification), also applies in cases involving other claims.

Jessen v. *United States,* 10th Cir., 1954, 212 F.2d 897, 900.

Schuman v. *United States,* 9th Cir., 1953, 208 F.2d 801, 802, 804-805.

Parr v. *United States,* 9 Cir., 1959, 272 F.2d 416, 422.

Batterton v. *United States,* 8th Cir., 1958, 260 F.2d 233, 236.

Glover v. *United States,* 8th Cir., 1961, 286 F.2d 84, 87.

Weaver v. *United States,* 8th Cir., 1954, 210 F.2d 815, 822-823.

Taffs v. *United States,* 8th Cir., 1953, 208 F.2d 239, 331-332.

United States v. *Close,* 7th Cir., 1954, 215 F.2d 439.

United States v. *Wilson,* 7th Cir., 1954, 215 F.2d 443, 446.

Jewel v. *United States,* 6th Cir., 1953, 208 F.2d 770, 771-772.

Pine v. *United States,* 4th Cir., 1954, 212 F.2d 93, 96.

United States v. *Hartman,* 2nd Cir., 1954, 209 F.2d 366, 368, 369-370.

United States v. *Titsuo Izumihara,* 120 F. Supp. 36, 40.

"In the light of the Supreme Court's decisions and the decision of the United States Court of Appeal for the Ninth Circuit in the case of Schuman v. United States, 208 F.2d 801, even though these are cases involving ministers, *I think the same spirit of decision is applicable here.*" (Italics supplied.)

In *Jessen* v. *United States,* (10th Cir., 1954) 212 F.2d 897, after quoting from *Dickinson, supra,* this Court said:

"Here, the uncontroverted evidence supported the registrant's claim . . . There was a complete absence of any impeaching or contradictory evidence. It fol-

lows that the classification made by the State Appeal Board was a nullity . . ." [900]

There must be an affirmative finding that his evidence lacked credibility. "It is hard to see how the board could have refused a deferment under the case of *Dickinson* v. *United States,* 346 U.S. 389, unless there was an affirmative finding that the evidence lacked credibility." *United States* v. *Williams,* No. 8917 Criminal, D. Conn., April 2, 1954, Judge J. Joseph Smith. And see *United States* v. *Peebles*, 7th Cir., 220 F.2d 114, 119, and cases cited. Also *Hagaman* v. *United States*, (3rd Cir.) 213 F.2d 86.

To repeat, and conclude this portion of the argument, no one has questioned Hamilton's veracity, and there is no evidence to rebut his *prima facie* case.

There remains one final argument on the point that the action of the Selective Service System board was arbitrary and without basis in fact. We have already shown that the dependency (hardship) classification in the Selective Service System is Class III-A. Prior to 28 September, 1951, the regulations required that all married men were to be classified in Class III-A. The needs of the Korean war required a change. After that date fatherhood was a standard test, with other family responsibilities also qualifying the registrant for Class III-A.

It is beyond dispute that during the early part of this period, the fact of being a husband in a *bona fide* family relationship was alone sufficient to make mandatory the III-A Classification, although local boards, following direc-

tives from the National Director and State Directors did not think so! See *Ex parte Barrial,* S.D. Calif. 1952, 101 F. Supp. 348.

On September 11, 1963, the President, by Executive Order No. 11119, changed the regulation back to pre-28 September, 1951: merely being a husband became and presently is sufficient for classification in Class III-A. After E.O. No. 11119 no fathers have been ordered to report for induction; outstanding orders were cancelled.

It may be argued that this appellant, unfortunately, was born a month or so too soon and that the Executive Order has no bearing on our case. Not so. The emergence of E.O. No. 11119 is important in considering whether appellant, Hamilton, made out a *prima facie* case for a III-A classification *when* he presented his new and further evidence. By September 11, 1963, standards his file showed much more than what is presently required, but the question should be put this way: By standards properly used on the day this new and further evidence came in to the boards's office did he make out at least a *prima facie* case? E.O. No. 11119 is pertinent to our inquiry because nothing took place in the short period between appellant's presentation of evidence and the conclusive "finding" of E.O. No. 11119. There was no significant change in military need between the time of the local board's rejection of his request and E.O. No. 11119. The local board acted arbitrarily by any standard.

It is common knowledge that in this era the passage of a few years makes much of the offensive and defensive armament obsolete. In our special area of concern it is to

be noted that nuclear and "machine" warfare depends on a force of highly trained operators. For some years past the average monthly draft calls have been mere tokens and these men have not been trained for modern technological warfare or even retained for the period necessary for this. Why? Because the need for mass manpower for military purposes is clearly a thing of the past.

Certain facts are commonly known: the changing technology of this nuclear age; that only one service, the army, has been using draftees; the country's population explosion with the projected figures for males becoming 18 soon accelerating, due to the great post WWII baby crop.

The unreasonableness of the local board's refusal to formally reopen is dramatically demonstrated by E.O. No. 11119. This Executive Order is for all purposes a finding by the highest authority that the hardship expression in the regulations is not a fixed formula.

E.O. 11119 was a finding of fact. It was not a mere fiat of the Executive. It was one of a series of over three score such executive orders, that is, of changes in the Selective Service Regulations, since 1948.

From the commencement of the Act in 1948, to and including May 1, 1963, the agency has issued 77 packets. These packets consist of one to over 100 pages each, for substitution insertion in the binder containing the Selective Service Regulations. Each packet contains one or more changes in the regulations. Regulation changes require an Executive Order. In a very few instances an

amendment of the Act, by the Congress is the basis for the packet or a portion of it.

These orders do not originate in the mind of the Chief Executive, of course, nor even do they originate in the White House. They originate at 451 Indiana Avenue, N. W., Washington 25, D.C., the office of the Director of the Selective Service System. They are sent to the President for signature and from there go to the Federal Register. Upon publication they have the force of law. See *Ex parte Asit Ranjan Ghosh,* (S.D. Calif., 1944) 58 F. Supp. 851, for an excellent discussion of such documents by a district judge who had been a Selective Service official, the most thorough discussion of this subject known to counsel.

In sum: to become law, they must be published; since 1950 there have been several score such Executive Orders changing the regulations.

These Executive Orders are to meet *existing* conditions; often, to correct "faulty" regulations. A few examples:

E.O. No. 10594, dated January 31, 1955, changed "shall" to "may" in 32 C.F.R. § 1604.41, the regulation providing for the local boards to have Advisors for Registrants. This followed the raising of the point (no advisor) in *Davidson* v. *United States,* No. 14356, 9 Cir., decided December 27, 1954.

E.O. No. 10420, dated December 17, 1952, added "by the registrant" to 32 C.F.R. § 1624.2, the regulation providing that a summary of the Appearance Before Local Board is to be placed in the file for the Appeal Board's

study. This Executive Order followed the dismissal of *U. S.* v. *Tutschulte,* No. 21926, D.C.S.D. Calif. and *U. S.* v. *Mock,* No. 21963, D.C.S.D. Calif., the preceding year, having been dismissed because the board had failed to place such a summary in the file of each of these two defendants.

Generally, however, these Executive Orders are Findings of Fact. They are determinations of current conditions and needs. E.O. No. 11119 was precisely this:

Wednesday, September 11, 1963 9865

FEDERAL REGISTER
Executive Order 11119

Amending The Selective Service Regulations

By virtue of the authority vested in me by the Universal Military Training and Service Act (62 Stat. 604), as amended, I hereby prescribe the following amendments of the Selective Service Regulations prescribed by Executive Order No. 10735 of October 17, 1957, No. 10985 of January 6, 1962, and No. 11098 of March 14, 1963, and constituting portions of Chapter XVI of Title 32 of the Code of Federal Regulations:

1. Subparagraph (3) of paragraph (a) of section 1631.7 of Part 1631, Quotas and Calls is amended to read as follows:

"(3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who do not have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first."

2. Subparagraphs (4) and (5) of paragraph (a) of section 1631.7 are redesignated as subparagraphs

(5) and (6), respectively, and a new subparagraph (4) is added to paragraph (a) to read as follows:

"(4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first."

John F. Kennedy

THE WHITE HOUSE,

September 10, 1963.

[F.R. Doc. 63-9793; Filed, Sept. 10, 1963; 12:27 p.m.]

While no one can argue that such an Order has retroactive effect we believe it is reasonable and proper to argue, as we have been doing that it is a conclusive finding of a state of affairs, of a desirable standard for the draft system, of the Nation's need. Whatever doubt may possibly have existed concerning the need of the armed forces for men with dependents was completely resolved. This is akin to the production of newly discovered evidence, after a jury determination. Justice requires the consideration of such evidence.

Although the mere fact of marriage, and it alone, at the time appellant was making his showing for a III-A classification, was insufficient it coupled with his initial showing of his mother's situation met the needs of a *prima facie* case. His subsequent showing made a reasonably strong case. The effort of the board to investigate his claims was proper. If he had failed to produce the

certified evidence asked of him, or, if it were shown that the evidence produced was sham we would have a different situation. He produced; the board reneged. That is a correct estimate of the situation, we submit.

CONCLUSION.

For the reasons given the judgment of the trial court should be reversed and the writ should issue.

Respectfully,

J. B. Tietz,
Attorney for Appellant.

SEPTEMBER 30, 1963.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

---,

J. B. Tietz,
Attorney for Appellant.